Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LARRY D. DAVIS,
Petitioner,

v.

JOHNSON CONTROLS, INC.,
Respondent.

On Petition for a Writ of
Certiorari to the United States
Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Plaintiff's claim for handicap discrimination under the Missouri Human Rights Act, Mo. Revised Statute § 213.010, *et seq.* is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).

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IN THE

SUPREME COURT OF TH[E] UNITED STATES

OCTOBER TERM, 1994

No.

LARRY D. DAVIS,
Petitioner,

v.

JOHNSON CONTROLS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Larry D. Davis, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on April 22, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is officially reported at 21 F.3d 866, unofficially reported at 146 L.R.R.M. (BNA) 2382, and reprinted in the Appendix to this Petition at Pet. App. 1a. The opinion in the United States District Court for the Western District of Missouri has not been published but is reprinted at Pet. App. 12a. The Denial of Rehearing by the Eighth Circuit on June 7, 1994 has not been published but is reprinted at Pet. App. 11a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1994. A timely Petition for Rehearing was filed on May 6, 1994. The Petition for Rehearing was denied on June 7, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 213.055 Mo. Rev. Stat. of the Missouri Human Rights Act provides in relevant part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or handicap of any individual:

(a) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Plaintiff filed suit in the District Court for the Western District of Missouri against Johnson Controls alleging that Johnson Controls had discriminated against Plaintiff by refusing to return him to work because of a

handicap that he suffers with regards to a back condition. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the Plaintiff being a citizen of Missouri and the Defendant a citizen of Wisconsin.

This suit was filed following the issuance of a Notice of Right to Sue letter by the Missouri Commission on Human Rights as a result of a complaint that Plaintiff filed with the Commission on September 21, 1990. Plaintiff alleged that Johnson Controls' refusal to return him to work violated Missouri's Human Rights Act which prohibits discrimination based upon a handicap.

In February of 1989 Plaintiff injured his back and was unable to work. Johnson Controls denied his request to return to work on February 27, 1989 and Plaintiff grieved that refusal which was upheld by an arbitrator on November 3, 1989. Following the arbitrator's decision, Plaintiff felt that his back condition had improved to an extent that would allow him to return to work. In late

November of 1989, Plaintiff sought to return to work, but was advised that until he could provide medical documentation satisfactory to Johnson Controls, he would not be permitted to return to work. On May 31, 1990, after receiving a return to work note from his doctor, Plaintiff again approached Johnson Controls about returning to work. On June 6, 1990, Plaintiff received a letter from Johnson Controls advising him that he would not be permitted to return to work at that time. Thereafter Plaintiff filed his Complaint with the Missouri Commission on Human Rights.

Following the filing of this action in District Court Johnson Controls moved to dismiss the case or in the alternative for summary judgment. Johnson Controls argued that Plaintiff's Complaint was barred as Plaintiff's claim under Missouri's Human Rights Act was preempted by § 301 of the LMRA. Defendant further argued that Plaintiff's claim was barred by the statute of limitations.

The District Court granted Johnson Controls'

Motion to Dismiss on the basis that Plaintiff's claim was preempted by § 301 of the LMRA. Plaintiff appealed to the Eighth Circuit Court of Appeals which affirmed the District Court's dismissal of the case on preemption grounds. The Eighth Circuit denied Plaintiff's Request for Rehearing.

The Eighth Circuit Court of Appeals concluded that the relocation of Plaintiff to a position commensurate with his physical limitations would require an examination of the seniority rights of both Davis and other employees under the collective bargaining agreement and as such Plaintiff's claim was preempted under *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). The Court did not reach Johnson Controls' statute of limitations argument in view of its affirmance on the preemption issue.

REASONS FOR GRANTING THE WRIT

I. The Importance of the Issue

The Missouri Human Rights Act essentially parallels Title VII's[1], prohibitions against discrimination based upon an individual's race, color, religion, sex or national origin with one important additional prohibition, that of handicap discrimination. The Act provides that it is the duty of the Commission on Human Rights to eliminate and prevent prohibited discrimination, including discrimination based upon handicap. The Act further provides the Commission with the ability to remedy such unlawful employment practices and gives to individuals the right to bring a civil action in court to seek redress for such unlawful employment practices. Mo. Rev. Stat. § 213.111.

The importance of this Court granting *certiorari* arises from the fact that the effect of the Eighth Circuit's

[1] 42 U.S.C. § 2000e-2

decision in this case is to foreclose the right of unionized employees to seek redress for the discriminatory practices of their employers under non-negotiable state law. To find, as the Eighth Circuit Court of Appeals did, that Plaintiff's state law claim of handicap discrimination is preempted by § 301 of the LMRA effectively emasculates the explicit prohibitions of the statute and forecloses union members' right to access to this statute while non-union employees are not so similarly affected. Unionized employees have just as much right to be free from handicap discrimination as non-unionized employees.

The results of this decision have a far-reaching impact beyond that of this case alone. Already the impact of this decision is affecting other similar cases now pending in federal court. Not only does this decision effectively rewrite the Missouri Human Rights Act but it also rewrites all of the other similar acts enacted by other States and impacts unionized employees seeking redress under those acts. To date, at least *39* other states have

enacted legislation similar to the Missouri Human Rights Act, designed to specifically protect the rights of handicapped employees. All of these statutes would be negatively impacted by this decision that such claims are preempted by § 301(a). See App. p. 31a.

It further needs to be considered as to where does this application stop? Today if handicap discrimination under state law is preempted by § 301, tomorrow will it be race or sex? What about other forms of discrimination prohibited by state law but not protected under federal law? All of these provide important reasons as to why this Court should grant *certiorari.*

Petitioner is not aware of this Court being faced with the question of whether a state discrimination law, particularly handicap discrimination, is preempted under § 301. As such, this provides the Court with the opportunity to not only rule on this question for the first time, but also to give further directions with regards to the scope of § 301 preemption. As such, this case provides

the Court the ideal case to make and give such directions.

II. The Result Below is in Conflict with Decisions of this Court

The decision rendered by the Eighth Circuit panel below cannot be reconciled with this Court's seminal decisions on § 301 preemption of *Allis Chalmers v. Lueck, supra* and *Lingle v. Norge Division of Magic Chef, supra.* These two cases teach that § 301 preempts only if resolution of the state law claim depends upon the meaning of a collective bargaining agreement. *Lingle, supra* at 405-406. If the claim is independent of the collective bargaining agreement and is based upon a non-negotiable state right, § 301 does not preempt the claim. *Lueck, supra* at 214; *Lingle, supra* at 408-409.

Subsequent to the Eighth Circuit's decision in this case, this Court has made its further pronouncements on § 301 preemption and the meanings of *Lueck* and *Lingle* with the recent decisions of *Livadas v. Bradshaw*, ____ U.S. ____, 114 S.Ct. 2068 (1994); and *Hawaiian Airlines, Inc. v.*

Norris, ____ U.S. ____, 114 S.Ct. 2239 (1994). Both of these cases are of tremendous significance in Plaintiff's request for this Court to grant certiorari. *Livadas* involved the question of whether a California state statute was preempted under § 301(a) and the NLRA. This Court found that the California state statute was not preempted by §301(a).

In *Livadas*, this Court found, in following *Lingle*, that when liability is governed by independent state law the fact that a collective bargaining agreement will be consulted in the course of state law litigation does not require the claim to be extinguished by § 301. *Id.* at pg. 2079. This Court further noted the special dangers that can occur when distinctions arise between union represented employees and those who are not. In fact, the Court noted that the widespread practice in Congress and State legislatures has been to bestow "basic employment guarantees and protections on individual employees without singling out members of labor unions (or those

represented by them) for disability . . ." *Id.* at pg. 2081. The Missouri Human Rights Act makes no such distinction between unionized and non-unionized employees.

Hawaiian Airlines teaches that substantive protections provided by State law are not preempted by § 301 and the fact that the same analysis of the facts would be required in both a grievance proceeding and a state court action does not mandate § 301 preemption. *Id.* at 2246, 2248. If the employee's claim is based on rights arising out of a statute "designed to provide minimum substantive guarantees to individual workers" *Id.* at 2247, citing *Atchison T. & S.F.R. v. Buell*, 480 U.S. 557, 565 (1987) quoting *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 737 (1981), such a claim is not preempted. *See* also *Lingle, supra* at 412. Likewise, the fact that there exists a potential C.B.A. based remedy does not deprive employee of independent remedies available under state law. *Hawaiian Airlines, supra* at 2248.

Consequently, this decision by the Eighth Circuit Court of Appeals is in conflict with the decisions of this Court and Petitioner would request *certiorari* be granted to resolve this conflict.

III. The Decision Below Conflicts with the Decisions of Other Courts of Appeals

The decision of the Eighth Circuit panel below conflicts with a number of decisions from other circuits addressing the question of § 301 preemption under state handicap laws. The Ninth Circuit has addressed the issue in *Miller v. A T & T Network Systems*, 850 F.2d 543 (9th Cir. 1988); *Ackerman v. Western Electric Co.*, 860 F.2d 1514 (9th Cir. 1988) and *Ramirez v. Fox Television Station*, 998 F.2d 743 (9th Cir. 1993). These cases found that the plaintiffs' handicap discrimination claims under state law were not preempted by § 301. The Sixth Circuit ruled the same in *Smolarek v. Chrysler Corporation*, 879 F.2d 1326 (6th Cir. 1989) and *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989).

While there are several circuits, including the Ninth Circuit, that has found handicap discrimination claims under state law to be preempted by § 301, these cases are factually distinguishable. *Crosto v. Burlington Northern Railroad Company*, 999 F.2d 381 (9th Cir. 1993) and *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992). The distinction is that the contract in both of those cases established physical condition requirements for job performance, benefits and ability to return-to-work. Such provisions provide a factually distinguishing basis to the present case as the present collective bargaining agreement has no such provisions in it. Of further note, is that even with those provisions, Plaintiff would still contend that claims under independent state law are non-negotiable and thus are not preempted by § 301.

IV. Decision of the Court of Appeals is Erroneous

One of the key touchstones under *Lueck* and *Lingle* is that of whether the state law claim is based upon a substantive non-negotiable state law right. Substantive

protections provided by state law, independent of whatever labor agreement might govern, are not preempted and different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide "minimum substantive guarantees to individual workers", *Hawaiian Airlines, supra* at 2472; *Lingle, supra* at 412. Plaintiff brought his claim to enforce rights arising out of a statute designed to provide "minimum substantive guarantees to individual workers", that of a prohibition against handicap discrimination. Johnson Controls is, as are all employers doing business in the State of Missouri, subject to the Missouri Human Rights Act and they may not contract away the substantive guarantees provided to individuals by the Missouri State Legislature. No exception is made in the Act for unionized employees. Section 301 does not grant parties to a collective bargaining agreement the ability to contract for what is illegal under State law, *Hawaiian Airlines, supra* at 2248 quoting *Lueck* at 211-12. Plaintiff believes it would be

illegal for Johnson Controls to contract away the prohibition against handicap discrimination under Missouri law. As such, Plaintiff's right to be free of handicap discrimination is independent of the collective bargaining agreement.

In evaluating § 301 preemption, this Court has looked to the source of the duty the plaintiff seeks to enforce. If the source of the duty arises from state law, the claim is "independent" and is not preempted. But, if the *only* source of the claim arises from the contract, then the claim is preempted. *Hawaiian Airlines*, *supra* at 2246. On the other hand, even though the state law claim would require the same analysis of the facts as would be required under the collective bargaining agreement, this does not preempt the state law claim. *Livadas*, *supra* at 2078; *Hawaiian Airlines*, *supra* at 2248-49. Likewise, the fact that the collective bargaining agreement will be consulted in the course of state law litigation or that a potential collective bargaining agreement-based remedy may exist

does not preempt the employee's state law claim. *Livadas, supra* at 2079; *Hawaiian Airlines, supra* at 2249.

The Eighth Circuit's decision below totally ignores these principles. Its decision below addresses none of these principles and does not even discuss the question of whether or not Missouri's handicap discrimination law is a non-negotiable right designed to provide "minimum substantive guarantees to individual workers". Without addressing these underlying issues in § 301 preemption, the basis for the Eighth Circuit's decision below is flawed.

The basis for the Eighth Circuit decision appears to be on two points. First, that Title VIII, § 60-3.060(1)(G)(3)(D) of the Missouri Administrative Code (Reprinted at Pet. App. 26A) requires the Court to refer to the collective bargaining agreement. Plaintiff has argued all along, and continues to argue, that the interpretation of this regulation has been taken out of context. The wording of the disputed portion of this regulation is in reference to the ownership interest in the

subject of the proposed accommodation, i.e. whether the employer owns or leases or rents the building or machinery to which the proposed accommodation would have to occur. This C.S.R. would permit reference to the terms of an agreement, such as a lease, to determine whether or not the employer had the legal authority to make such an accommodation to the premises or the equipment. This provision has nothing to do with the terms of a collective bargaining agreement. This provision is simply inapplicable in the context to which it is being applied at the present time. To argue that this language requires interpretation of the collective bargaining agreement is not in keeping with the plain meaning of the language of this regulation.

The second basis for the Eighth Circuit's decision is that Plaintiff's claim would require examination of the seniority rights of both Plaintiff and other employees under the collective bargaining agreement. Plaintiff disagrees with this additional finding of preemption. As

taught by both *Livadas* and *Lingle* the fact that a collective bargaining agreement will be consulted in the course of state law litigation does not require the claim be preempted. *Livadas*, *supra* at 2079. Likewise, the fact of the existence of a potential collective bargaining agreement-based remedy does not deprive the employee of remedies available under state law.

In discussing this point, the Eighth Circuit apparently is making an initial assumption that Plaintiff's claim is limited to him seeking to be transferred to a different job. But, Plaintiff's claim is in the alternative, seeking first the return to his previous job and then as an alternative a transfer to a different job. Thus, this initial assumption is erroneous.

The Court cites the case of *Umphries v. Jones*, 804 S.W.2d 38 (Mo.App. 1991) for the basis that reasonable accommodation does not require an employer to do that which would interfere with the legitimate rights of other employees absent an established policy to that effect.

Plaintiff does not necessarily dispute the results in the *Umphries* case based upon the facts of that case. In fact, this principal is the same under the Federal Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and presumably under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* See *School Board of Nassau County v. Arlene*, 480 U.S. 273 (1987). Appellant contends that the *Umphries* case is inapplicable because the Court in *Umphries* found an established policy that did not permit such transfers or bumping to accommodate handicaps. While in the case at bar, no such finding has been made. In fact, Plaintiff contends that Johnson Controls has a policy of accommodating handicapped employees separate and apart from the collective bargaining agreement. If an employer does have such a policy, then the employer cannot deny an employee alternative employment opportunities available under the employer's existing policies. *School Board of Nassau County v. Arlene*, *supra* at 289, n.19.

These are principles totally separate and independent of any provision of the collective bargaining agreement. The *Umphries* case is a state law case not involving the interpretation of a collective bargaining agreement. Thus, this issue of whether an employer can transfer an employee in order to accommodate him arises under substantive principles of state law rather than under the terms of the collective bargaining agreement. As such, no reference to the seniority provisions of the collective bargaining agreement is necessary and the holding of the *Umphries* case is inapplicable on its facts.

In *Hawaiian Airlines*, the petitioners made a similar argument that resort to the collective bargaining agreement would have to be had to determine the basic issue of liability - that of whether the respondent was discharged. This Court rejected that argument as the argument raised a "purely factual question". *Id* at 2251. This same analysis applies to the argument that the seniority provisions of the contract would have to be

consulted. The question of whether or not Johnson Controls can make the necessary accommodation is a "purely factual question". No interpretation of the agreement is necessary.

For all of these reasons, Plaintiff believes the decision of the Eighth Circuit is erroneous.

CONCLUSION

The Petition for a Writ for Certiorari should be granted and the judgment below reversed.

Respectfully submitted,
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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1392

LARRY D. DAVIS,
Appellant,
v.

JOHNSON CONTROLS, INC.,
Appellee.

Appeal from the United States District Court
for the Western District of Missouri
No. 92-0485-CV-W-2
Hon. Fernando J. Gaitan, Jr., *Judge*

Submitted Sept. 17, 1993.
Decided April 22, 1994.
Rehearing Denied June 7, 1994.

Before McMILLIAN, WOLLMAN, and MORRIS SHEPPARD ARNOLD, *Circuit Judges.*

WOLLMAN, *Circuit Judge.* Larry D. Davis brought a handicap discrimination claim against Johnson Controls, Inc. ("Johnson") in District Court.[1] The District Court dismissed the Complaint on the ground that Davis's claim is preempted by § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a). We affirm.

I.

In 1979 Davis went to work as a production worker for Johnson, which manufactures automobile and industrial batteries. In February 1989 he injured his back and was unable to work. Johnson denied his request to return to work on February 27, 1989. Davis's back condition improved, and on May 31, 1990, his physician indicated that he could return to work. Nevertheless, on June 6, 1990, Johnson again refused to allow Davis to return.

On June 1, 1992, Davis filed this action, alleging

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[1] The Honorable Fernando J. Gaitan, Jr. United States District Judge for the Western District of Missouri.

that Johnson had discriminated against him on the basis of his handicap (his back condition) by not permitting him to return to work after his condition had improved, in violation of the Missouri Human Rights Act. Johnson moved to dismiss Davis's Complaint or, in the alternative, for summary judgment on the grounds that Davis's claim was preempted by § 301 and barred by the statute of limitations. Finding Davis's claim preempted, the District Court dismissed the action and did not rule on the question whether the statute of limitations barred Davis's action.

II.

The District Court styled its ruling as one that granted Johnson's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. We conclude, however, that the ruling was in the nature of a summary judgment, for it seems apparent that the District Court

took notice of the matters contained in the affidavits offered in support of and in opposition to the alternative motion for summary judgment. Since Davis filed an affidavit and supporting memorandum in opposition to the motion for summary judgment, he cannot complain that he did not have notice that the court might consider and rule upon that motion. In any event, any lack of formal notice by the District Court that it would rule on the Motion for Summary Judgment rather than on the Motion to Dismiss was harmless in view of Davis's adequate opportunity to respond to the summary judgment motion and the lack of any showing that any material facts were disputed or missing from the record. See, *e.g.*, *Angel v. Williams*, 12 F.3d 786, 788-89 (8th Cir. 1993); *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992); *cf. Phelps v. United States Federal Government*, 15 F.3d 735, 739 (8th Cir. 1994); *Layton v. United States*, 919 F.2d 1333, 1334-35 (8th Cir. 1990).

§ 301(a) of the Labor Management Relations Act provides: Suits for violation of contracts between an

employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a). In *Textile Workers Union v. Lincoln Mills of Alabama*, the Supreme Court held that § 301 not only provides Federal Courts with jurisdiction over disputes involving collective-bargaining agreements, but also authorizes "Federal Courts to fashion a body of federal law for the enforcement" of such agreements. 353 U.S. 448, 451, 77 S.Ct. 912, 915, 1 L.Ed.2d 972 (1957). In *Teamsters v. Lucas Flour Co.*, the Court further stated that § 301 mandates that all courts, whether state or federal, apply Federal law to controversies arising from Collective Bargaining Agreements. 369 U.S. 95, 103-04, 82 S.Ct. 571, 576-77, 7 L.Ed.2d 593 (1962). Then, in *Allis-Chalmers Corp. v. Lueck*, the Court held that when the resolution of

a State law claim is substantially dependent upon analysis of the terms of a Collective Bargaining Agreement, the claim is preempted and Federal Labor Law applies. 471 U.S. 202, 220, 105 S.Ct. 1904, 1916, 85 L.Ed.2d 206 (1985). In *Lingle v. Norge Division of Magic Chef, Inc.*, the Court made clear, however, that a State Law claim is preempted by § 301 only if resolution of the claim requires the interpretation of a Collective Bargaining Agreement. 486 U.S. 399, 413, 108 S.Ct. 1877, 1885, 100 L.Ed.2d 410 (1988). *See also United Steelworkers of America v. Rawson*, 495 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990); *Hanks v. General Motors Corp.*, 859 F.2d 67 (8th Cir.1988).

Pursuant to § 213.055 of the Missouri Revised Statutes, an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," because of the individual's handicap. Mo.Rev.Stat. § 213.055. To establish a *prima facie* case of handicap discrimination under this section, Davis must prove three elements: (1)

that he had a handicap within the meaning of the statute; (2) that Johnson took adverse action against him; and (3) that his handicap was a factor in Johnson's adverse action. *Rose City Oil Co. v. Missouri Comm'n on Human Rights*, 832 S.W.2d 314, 316 (Mo.Ct.App. 1992). The statute defines handicap as a "physical or mental impairment which substantially limits one or more of a person's major life activities, a condition perceived as such, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job." Mo.Rev.Stat. § 213.010(10) (emphasis added).

Johnson argues that Davis's claim is preempted because his *prima facie* case will involve interpreting the Collective Bargaining Agreement between Johnson and the union representing Johnson's employees. More specifically, Johnson contends that for Davis to establish that he is handicapped within the meaning of the statute, he will have to show that Johnson could have reasonably

accommodated his request to return to work. Johnson contends that this assessment requires reviewing Johnson's obligations under the Collective Bargaining Agreement and, consequently, interpreting the provisions of the agreement relating to seniority rights. In support of these arguments, Johnson points to Title VIII, §60-3.060(1)(G)(3)(D) of the Missouri Code of State Regulations which provides that in determining whether an accommodation is reasonable under the Missouri Human Rights Act, one factor to be considered is "the authority to make the accommodation under the terms of any bona fide agreement."

In *Umphries v. Jones*, 804 S.W.2d 38 (Mo.Ct.App. 1991), the Missouri Court of Appeals held that "reasonable accommodation" under the Missouri Human Rights Act did not require a teacher to be relocated within the school district if such a transfer would conflict with established school board policy and considerations of seniority in assignments. "Reasonable accommodation

does not require the employer to reassign an employee or to restructure a job in a way that would usurp the legitimate rights of other employees." *Id.* at 41.

The District Court therefore concluded, correctly, we believe, that the relocation of Davis to a position commensurate with his physical limitations would require an examination of the seniority rights of both Davis and other employees under the Collective Bargaining Agreement. Davis's contention that the Collective Bargaining Agreement allows for transfer without alteration of seniority rights, even if ultimately held to be correct, would perforce require interpretation of the agreement. Accordingly, the District Court correctly held that Davis's State law claim depends upon the meaning ultimately given to the Collective Bargaining Agreement and thus is preempted under the *Lueck- Lingle* doctrine.

In view of our affirmance on the preemption issue, we need not reach Johnson's contention that Davis's claim is barred by the statute of limitations.

The judgment is affirmed.

A True Copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1392WMKC

Larry D. Davis,	*	
	*	
Appellant,	*	Appeal from the United
	*	States District Court
vs.	*	for the Western District
	*	of Missouri.
Johnson Controls, Inc.,	*	
	*	
Appellee.	*	

The petition for rehearing by the panel is denied.

June 7, 1994

Order Entered at the Direction of the Court:

/S/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

No. 92-0485-CV-W-2

LARRY D. DAVIS,
Plaintiff,

v.

JOHNSON CONTROLS, INC.,
Defendant.

ORDER

Pending before this Court is Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment. Plaintiff filed this action against the Defendant, his employer, under the Missouri Human Rights Act, Mo.Rev.Stat. §§ 213.010-125 (1983, Supp.1992), alleging employment discrimination on the basis of his handicap. Plaintiff claims that Defendant unlawfully discriminated against him when it refused to permit him to return to work after he suffered a series of debilitating injuries.

I. BACKGROUND

Plaintiff began his employment in 1979 as a production worker for the Defendant, Johnson Controls, Inc. ("Johnson Controls"). In 1986, plaintiff injured his shoulder and neck, and as a result of this injury, plaintiff underwent surgery on his neck. Plaintiff also experienced lower back strains in 1986 and 1987. On March 10, 1988, plaintiff again injured his shoulder and lower back in an accident while working at Johnson Controls. A medical examination revealed that Plaintiff suffered from a herniated disk. Although Plaintiff returned to work, his back condition was again aggravated in June of 1988 and in February of 1989.

On February 13, 1989, due to the pain in his lower back, Plaintiff was unable to work and was referred by Defendant to the Med Clinic for a medical evaluation. On February 27, 1989, Plaintiff requested to return to work and submitted a doctor's note which stated that he could perform "light" work. Defendant denied this request

and placed Plaintiff on permanent leave of absence. By November 27, 1989, Plaintiff contends that his condition improved and again he asked to be allowed to return to work. Defendant denied this request on November 30, 1989, citing Plaintiff's failure to produce medical evidence that his condition had improved. On May 31, 1990, Plaintiff again requested that he be allowed to return to work and submitted a note from another doctor which stated that Plaintiff could perform "light" work. Defendant denied this request on June 6, 1990.

On September 21, 1990, Plaintiff filed an administrative complaint with the Missouri Commission on Human Rights. On June 1, 1991, Plaintiff filed the present case alleging a violation of the Missouri Human Rights Act. Defendant filed the instant motion arguing that Plaintiff's claim is preempted by the Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1973), and that Plaintiff's claim is barred by the statute of limitations. Upon review of the arguments on this motion,

the Court will grant Defendant's Motion to Dismiss for the reason that Plaintiff's claim is preempted by the Labor Management Relations Act.

II. STANDARD OF REVIEW

It is well established that in ruling on a Motion to Dismiss for failure to state a claim "that all well pleaded factual allegations in the complaint are true 'and [the court must] construe the complaint, and all reasonable inferences arising therefrom, most favorably to the pleader.' " *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (*citing Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986)). However, the liberality of this standard is applicable only to well pleaded facts (and inferences flowing from these facts). The court will not "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott*, 901 F.2d at 1488 (*citing Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)). Dismissal under Rule 12(b)(6) is not proper "unless it appears beyond doubt that the Plaintiff can prove no set

of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

A. Preemption by the Labor Management Relations Act

Defendant argues that Plaintiff's claim of employment discrimination based upon his handicap under the Missouri Human Rights Act is preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1978). § 301(a) of the LMRA provides: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988), the United States Supreme Court stated that § 301 requires preemption of a State law claim "if the resolution

of a State law claim depends upon the meaning of a Collective Bargaining Agreement." In other words, the court must determine whether the state law creates "non-negotiable State law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1984). See also *Hanks v. General Motors Corp.*, 859 F.2d 67, 69 (8th Cir. 1988) (a state wrongful discharge action is preempted if "a fair assessment of the claim would be impossible without reference to the Collective Bargaining Agreement"). However, the court must keep in mind the consideration that "not every dispute concerning employment, or tangentially involving a provision of a Collective Bargaining Agreement, is preempted by § 301 or other provisions of the Federal Labor Law." *Lueck*, 471 U.S. at 211.

In this case, Defendant argues that Plaintiff's claim

of handicap discrimination under the Missouri Human Rights Act ("MHRA") is preempted because an evaluation of the Collective Bargaining Agreement is necessary to determine Defendant's rights under the MHRA. Support for Defendant's argument begins with the definition of "handicap" in § 213.010(8) of the MHRA: "Handicap" [is] a physical or mental impairment which substantially limits one or more of a person's major life activities, or a condition perceived as such, which with or without reasonable accommodation does not interfere with performing the job, utilizing the place of public accommodation, or occupying the dwelling in question; Mo.Rev.Stat. § 213.010 (Supp.1992) (emphasis added). Defendant argues that the LMRA provides that interpretation of the Collective Bargaining Agreement is necessary to determine the meaning of "reasonable accommodation." Defendant points to the Missouri Code of State Regulations, 8 CSR § 60-3.060(1)(G)(3)(D), which provides that in determining whether an accommodation

is reasonable under the MHRA, one factor to be considered is "the authority to make the accommodation under the terms of any bona fide agreement ...;"[1]

Plaintiff contends that the handicap discrimination claim is "independent" of the Collective Bargaining Agreement. In support, Plaintiff principally relies on two handicap discrimination cases from the Sixth Circuit: *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989) and *Miller v. AT & T Network Systems*, 850 F.2d 543 (9th Cir. 1988). The Court finds that both of these cases are distinguishable from the present case.

In *Miller*, the Plaintiff filed suit against his employer alleging employment discrimination under Oregon state law because of his physical handicap. In addressing the issue of whether Plaintiff's claim was preempted under the LMRA, the Court considered "whether the state law was intended by the state to rely on

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[1] This regulation was adopted by the Missouri Commission on Human Rights as a guideline for the construction of the Missouri Human Rights Act. Mo.Rev.Stat. §213.030(b) (Supp.1992).

the terms of the Collective Bargaining Agreement, and whether the state intended to impose terms that the Collective Bargaining Agreement could not alter." *Id.* at 547-48. The Court held that the Plaintiff's claim was not preempted by the LMRA because the Oregon state courts interpreted the state statute as requiring an independent standard of discrimination apart from the Collective Bargaining Agreement. *Id.* at 549 ("Oregon has construed its discrimination statute so that it relies on standards of discriminatory firings that are independent of any standard of reasonable treatment set forth in the [Collective Bargaining Agreement]").

Unlike the case in *Miller*, Missouri state law provides that interpretation of the MHRA may rely on the terms of the Collective Bargaining Agreement, and the Collective Bargaining Agreement may define an employee's rights under the MHRA. In *Umphries v. Jones*, 804 S.W.2d 38, 41 (Mo.Ct.App. 1991), the Missouri Court of Appeals held that "reasonable accommodation" under

the MHRA does not require a school teacher to be relocated within the school district, where such a transfer conflicted with established school board policy and seniority in assignments. Although the *Umphries* case did not involve a Collective Bargaining Agreement, it is clear that the Court interpreted the language of the MHRA within the context of the employment policies of the school district. Furthermore, interpretation of the Collective Bargaining Agreement is necessary according to the Missouri State Code of Regulations, 8 CSR § 60-3.060(1)(G)(3)(D), which provides that one factor to consider in determining a "reasonable accommodation" is the employer's authority to make an accommodation under the terms of any agreement.[2]

The Court also finds that the decision in *Smolarek* is distinguishable. In *Smolarek*, the Court held that

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[2] As an example, Defendant asserts that relocation of Plaintiff would require an examination of the seniority rights of Plaintiff and other employees under the Collective Bargaining Agreement. Plaintiff argues that the Collective Bargaining Agreement allows for transfer without alteration of seniority rights. Regardless of the outcome, such a determination would necessarily require interpretation of the Collective Bargaining Agreement.

removal of Plaintiff's state law handicap discrimination claim was not permissible under the "well-pleaded complaint" rule because the federal question must appear on the face of the complaint. *Smolarek*, 879 F.2d at 1333. In that case, the Court found that removal was improper because Defendant argued that the defense, rather than Plaintiff's claim, required an interpretation of the Collective Bargaining Agreement. *Id.* The present case is distinguishable from *Smolarek* because this case does not involve the issue of removal. Furthermore, Plaintiff has the burden to establish that he could perform his job with reasonable accommodation from the employer. *See Umphries*, 804 S.W.2d at 41. Therefore, interpretation of the Collective Bargaining Agreement is necessary as part of Plaintiff's *prima facie* case.

In addition to the previous arguments, Plaintiff also cites the Supreme Court decision in *Lingle* for the general proposition that state anti-discrimination laws are not preempted by the LMRA. *Lingle*, 486 U.S. at 405-06.

However, this general proposition was first expressed as dicta by the Court of Appeals in *Lingle*. The Court of Appeals remarked that state anti-discrimination are not preempted because Congress has affirmatively endorsed state anti-discrimination remedies in Title VII of the Civil Rights Act of 1964. *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1046 *n.* 17 (7th Cir.1987), *rev'd*, 486 U.S. 399 (1988). On appeal, the United States Supreme Court did not expressly adopt the Court of Appeals comment. Rather, the Court stated that this distinction is unnecessary because the principle focus of preemption analysis is whether the court can resolve a discrimination claim without interpretation of the Collective Bargaining Agreement. *Id.* at 412.

Based upon the foregoing analysis, the Court finds that Plaintiff's claim of handicap discrimination is not an independent state law claim, and therefore, Plaintiff's claim is preempted by § 301 of the LMRA. Accordingly, it is hereby ORDERED that Defendant's Motion to

Dismiss for failure to state a claim is granted.

ENTER:

/S/ FERNANDO J. GAITAN, JR.

FERNANDO J. GAITAN, JR.
UNITED STATES DISTRICT JUDGE

DATED: DECEMBER 31, 1992
KANSAS CITY, MISSOURI

MISSOURI ADMINISTRATIVE CODE
8 CSR § 60-3.060
Handicap Discrimination in Employment

PURPOSE: The Missouri Commission on Human Rights has the power and authority to adopt suitable rules to carry out the provisions of the state Fair Employment Practices Act pursuant to 213.030(6), RSMo(1986). The rules represent the commission's construction of provisions dealing with handicap discrimination in employment.

(1) Definitions. When used in these rules -

(A) The phrase physical or mental impairment means -

1. Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one (1) or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

2. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and learning disabilities;

(B) Disability means a person either has a physical or mental impairment which substantially limits one (1) or more of that person's major life activities; or has a record of such impairment; or is regarded as having such an impairment.

1. Minor temporary illnesses shall not be considered physical or mental impairments resulting in a disability. Examples of minor temporary illnesses include, but are not limited to, broken bones, sprains or colds;

(C) Major life activities means those life activities which affect employability such as communication, ambulation, self-care, socialization, education, vocational training, employment and

transportation;

(D) Has a record of such an impairment means a person has a history of, or has been misclassified, as having a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer as constituting such a limitation;

(E) Is regarded as having such an impairment means a person -

1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or by others as constituting such a limitation; or

2. Has none of the impairments defined in paragraph (1)(A)1, or 2, of this rule, but is treated by an employer or by others as having an impairment which substantially limits a major life activity;

(F) Disability unrelated to a person's ability to perform the duties of a particular job or position means a disability which does not substantially interfere with a person's ability to perform the essential functions of the employment for which the person applies, is engaged in or had been engaged.

1. Uninsurability or increased cost of insurance under a group or employee insurance plan does not render a disability job related.

2. A disability is not job related merely because the job may pose a threat of harm to the employee or applicant with the disability unless the threat is one of demonstrable serious harm to his/her safety.

3. A disability is job related if placing the disabled person n the job would pose a demonstrable threat of harm to the health and safety of others.

4. A disability is not job related if, with reasonable accommodation, it does not prevent performance of the essential functions of the job in question; and

(G) Reasonable accommodation means -

1. An employer shall make reasonable accommodation to the known limitations of a handicapped employee or applicant;

2. Accommodation may include:

A. Making facilities used by employees readily accessible to and usable by handicapped person; and

B. Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters and other similar actions; and

3. In determining whether an

accommodation is reasonable, factors to be considered include, but are not limited to:

A. The nature and cost of the accommodation needed;

B. The size and nature of a business, including the number and type of facilities and the structure and composition of the work force;

C. The good faith efforts previously made to accommodate similar disabilities; and

D. The ownership interest in the subject of the proposed accommodation including the authority to make the accommodation under the terms of any *bona fide* agreement such as a lease.

STATES THAT HAVE ENACTED LEGISLATION TO SPECIFICALLY PROTECT THE RIGHTS OF HANDICAPPED WORKERS

1. Alabama ..... ALA. CODE § 21-5-1 (1975)
2. Alaska ..... ALASKA STAT. § 18.80.220
3. Arizona .. ARIZ. REV. STAT. ANN. § 41-1463
4. California ..... CAL. GOVT CODE § 12940
5. Colorado ..... COLO. REV. STAT. § 24-34-402
6. Delaware ..... DEL. CODE. ANN. tit. ch. 7, Subchapter III, *et seq.*
7. District of Columbia ..... D.C. CODE ANN. § 1-2512 (1981)
8. Florida ..... FLA. STAT. § 760.10
9. Georgia ..... GA. CODE ANN. § 34-6A-4
10. Hawaii ..... HAWAII REV. STAT. § 378-2
11. Illinois ..... ILL. REV. STAT. ch. 775 § 2013
12. Indiana ..... IND. CODE § 22-9-1-13
13. Iowa ..... IOWA CODE § 216.6
14. Kansas .. KAN. STAT. ANN. § 44-1001 *et seq.*
15. Kentucky ..... KEN. REV. STAT. § 207.150

16. Louisiana . . . . . LA. REV. STAT. ANN. § 46:2254

17. Maine . . . . . ME. REV. STAT. ANN. tit. 5 § 4573

18. Maryland . MD. ANN. CODE 1957, Art. 49B, § 16

19. Michigan . . . . . MICH. COMP. LAWS § 37.1203

20. Minnesota . . . . . MINN. STAT. § 363.03

21. Mississippi . . MISS. CODE ANN. § 25-9-149 (1972)

22. Montana . . . . . MONT. CODE ANN. § 49-4-101

23. New Hampshire N.H. REV. STAT. ANN. § 354-A:7

24. New Jersey . . . . . N.J. REV. STAT. § 10:5-4.1

25. New Mexico . . . . . N.M. STAT. ANN. § 28-1-7

26. New York . N.Y. Executive Law § 296 (McKinney)

27. North Carolina N.C. GEN. STAT. ch. 16 A § 168A-5

28. North Dakota . . . N.D. CENT. CODE § 14-02.4-03

29. Ohio . . . . . OHIO REV. CODE ANN. § 4112.02

30. Oklahoma . . . . . OKLA. STAT. tit. 74 § 1302

31. Pennsylvania . . . . . 43 P.A. CONS. STAT. § 955

32. Rhode Island . . . R.I. GEN. LAWS § 28-5-7 (1956)

33. South Carolina S.C.CODE ANN. § 43-33-530 (1976)

34. Tennessee . . . . . TENN. CODE ANN. § 8-50-103

35. Utah ..... UTAH CODE ANN. § 34-35-6

36. Washington ..... WASH. REV. CODE § 49.60.180

37. West Virginia ..... W. VA. CODE § 5-11-9

38. Wisconsin ..... WIS. STAT. § 111.31

39. Wyoming ..... WYO. STAT. § 27-9-105 (1977)